

Offers, Threats, and Unconstitutional Conditions

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Both the unconstitutional conditions doctrine and the contrasting "greater power includes the lesser" argument have suffered fierce academic criticism,¹ yet each survives. Justices of the Supreme Court continue to rely explicitly or implicitly on one or the other doctrine,² bringing a new wave of academic criticism.³

In this essay, I will suggest that the hoary threat/offer distinction helps explain and justify the continued survival of the unconstitutional conditions doctrine, but only a narrow version of that doctrine. At the same time, the threat/offer distinction also helps explain and justify the continued survival of a narrow version of the "greater includes the lesser" argument. My claim depends on a careful analysis of what constitutes a "threat" and an "offer," an analysis that looks to philosophical as well as legal sources.

Part I gives a simple example of the threat/offer distinction and briefly presents my thesis. In Part II, I step back to define the contours of the analysis. Only a small number of constitutional cases, I conclude, directly raise the issue of "unconstitutional conditions" (hereafter "UC") or "the greater power includes the lesser" (hereafter "GIL"). Part III defines the threat/offer distinction and suggests why, in its pure form, it is morally and constitutionally significant. Part IV attempts to apply the analysis to the more complicated, impure world of government benefit programs.

PART I

AN EXAMPLE, AND A PRECIS OF THE THESIS

I begin with an example, adapted from Professor Laurence Tribe.⁴ I then set out the basic thesis of this essay. More detailed supporting

1. For some recent examples, see Westen, *The Rueful Rhetoric of Rights*, 33 UCLA L. REV. 977 (1986); Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984).

2. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986); *Federal Communication Comm'n v. League of Women Voters*, 468 U.S. 364, 408 (1984) (Rehnquist, J., dissenting); *Regan v. Taxation with Representation*, 461 U.S. 540 (1983). See also *City of Lakewood v. Plain Dealer Pub. Co.*, 108 S. Ct. 2138, 2159 (1988) (White, J., dissenting).

3. Apart from this volume of essays, see Seidman, *Reflections on Context and the Constitution*, 73 MINN. L. REV. 73, 75-78 (1988); Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989) (severely criticizing the current unconstitutional conditions approaches, but supporting a new and more expansive approach); Epstein, *The Supreme Court 1987 Term—Foreward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988) (supporting the unconstitutional conditions doctrine only in a radically conservative form). Recent commentary on the *Nollan* case also discusses its "unconstitutional conditions"/"greater includes the lesser" themes. See, e.g., the collection of articles in *The Jurisprudence of Takings*, 88 COLUM. L. REV. 1581 (1988); Note, *Municipal Developments Exactions, the Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992 (1989).

4. See Tribe, *Private Choices and Public Funding: Abortion Revisited*, in J.

arguments will be found in the body of the essay.

Suppose the federal government selects 100 citizens at random for an experiment: it offers the 100 citizens \$200 each, in the form of a tax rebate, if they will not speak for two days. The purpose of the experiment is to discover some of the effects of people remaining silent for an extended period of time. The information that is thus disclosed might help the government understand how hostages and prisoners of war are affected by isolation.

Now consider a second version of the experiment. Again, the government selects 100 citizens at random, and asks them not to speak for two days. But this time, if the citizens choose speech over silence, the government will increase their taxes by \$200.⁵

The offer (the first version) seems clearly constitutional, while the threat (the second version) is clearly unconstitutional. Moreover, the same conclusions would be warranted if the offer and threat applied to government benefits such as welfare. That is, it is permissible for the government to offer welfare recipients an increase of \$200 in their benefits if they remain silent, but it is not permissible to threaten to decrease their benefits by \$200 if they choose to speak. So the threat/offer distinction applies both to direct regulations and burdens (such as taxes) and to withdrawals of government benefits (such as welfare).

As I will later argue in more detail, the threat is more troublesome than the offer because it is presumptively unfair for government to make citizens worse off, even to serve a legitimate interest, when citizens have neither contributed to the problem they have been "drafted" to correct nor received a reciprocal benefit. So threats should be subject to a higher degree of judicial scrutiny than offers. And this should be so whether the threat/offer is attached to a "gratuitous" government benefit or to an affirmative government burden.

For these purposes, a "threat" is a government proposal to make the citizen worse off than she would otherwise be if she refuses to accept an objectionable condition, while an "offer" is a proposal to make her better off than she would otherwise be if she accepts the condition. More precisely, where she would "otherwise be" means

CHOPER, Y. KAMISAR & L. TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1979-1980: AN EDITED TRANSCRIPT OF THE SECOND ANNUAL SUPREME COURT AND CONSTITUTIONAL LAW SYMPOSIUM* 256 (1981).

5. If this example seems unrealistic, imagine instead that the government offers a \$50 tax rebate if you give blood (offer), or instead increases your taxes by \$50 if you do not give blood (threat).

the level of benefits or burdens that the government would confer upon her if it were not permitted to attach to its proposal the condition to which she objects. This hypothetical descriptive test is not a test of what the recipient has historically received, nor a test of what she expects to receive, but a test of what she “otherwise” would receive (in the sense just defined).

Although this test helps explain our intuitions about the “pure” threat and offer in the examples just given, it needs modification as applied to the “impure” world of complex government benefit programs. For example, a work requirement that served as an eligibility condition for government welfare benefits would be considered a pure threat under the unmodified test, unless the government considered the condition so critical that government would drop the welfare program entirely rather than drop the condition. Here, the unmodified test does not seem to be a sensible criterion of which conditions are more troublesome and which conditions are less so.

I tentatively conclude that when the condition is plausibly related to the legitimate purposes of the government program, then the impure threat deserves less scrutiny than a pure threat would deserve. Two rationales support this conclusion. First, the same factors that militate in favor of higher scrutiny of pure threats militate in favor of lower scrutiny of impure ones: a government benefit program may offer reciprocal benefits, and its conditions may reflect real costs that the recipient imposes. Second, in the pure context, the nature of the government benefit is essentially irrelevant to its value as either a carrot or stick to induce desired conduct. But in the impure context, only a particular type of carrot or stick will serve the government’s purposes; the government is not simply using its largesse to induce compliance.

Thus, the threat/offer distinction helps explain why pure threats to reduce otherwise available levels of government largesse based on a condition affecting a constitutional right are just as troublesome as direct burdens or taxes. This is the narrow sense in which the unconstitutional conditions doctrine is valid. At the same time, when a benefit condition is plausibly related to the program’s purposes, the “impure” threat might be no more troublesome than an offer. In this narrow sense, the greater power includes the lesser.

PART II

WHEN DO UNCONSTITUTIONAL CONDITIONS AND “GREATER INCLUDES THE LESSER” ARGUMENTS REALLY MATTER?

The modern consensus about GIL and UC arguments is a moderate one: (1) the “greater” power to eliminate some government “benefit” does not always include the “lesser” power to impose a

condition that affects a constitutional right; (2) but at the same time, not every condition on government largesse that would be unconstitutional if imposed by "direct" regulation, or if attached to a "right" rather than a "privilege," is an unconstitutional condition.⁶

The "greater" does not include the "lesser" for the simple reason that the "lesser" is "greater" in one significant respect — it more greatly affects exercise of a constitutional right.⁷ For example, the government possesses the "greater" power to eliminate a welfare program. But it hardly follows that government could grant citizens welfare on the condition that they not publicly criticize public officials. This is a "lesser" power only in the sense that citizens have not been completely deprived of welfare. But it is a "greater" power because, unlike a complete elimination of welfare, it penalizes and may deter exercise of a constitutional right.⁸

On the other hand, just because the government cannot impose a condition "directly," it does not follow that the condition is always unconstitutional when attached to a government benefit. Consider the federal Hatch Act: Although the government may not forbid all citizens from campaigning, a "direct" infringement of political speech, it may forbid government employees from campaigning because of the unique dangers of corruption.⁹

If neither the UC argument nor the GIL argument is absolute, when, if ever, do they properly apply? Seth Kreimer has ably explored this question.¹⁰ I largely agree with his analysis and his conclusion that many supposed examples of the UC or GIL problem are better explained on other doctrinal grounds. In this section, I will briefly explain my own views.

One preliminary point: I will focus upon the UC/GIL problem in connection with the individual liberty provisions of the Constitution, such as the rights of free speech, of free exercise of religion, and of

6. For an especially clear statement of this moderate view, see Westen, *Rueful Rhetoric*, *supra* note 1.

7. See Kreimer, *Allocational Sanctions*, *supra* note 1, at 1310-11; Westen, *Rueful Rhetoric*, *supra* note 1, at 1012.

8. See *Speiser v. Randall*, 357 U.S. 513 (1958) (although tax exemption is a gratuitous benefit, the state violates the first amendment when it grants that benefit on condition that recipients affirm their loyalty to the state government).

9. See *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973).

10. Kreimer, *supra* note 1, at 1326-51 & 1353 n.221; Kreimer, *Government "Largesse" and Constitutional Rights: Some Paths Through and Around The Swamp*, 26 SAN DIEGO L. REV. 229 (1989).

privacy.¹¹ By contrast, structural provisions that allocate power between the branches of government or between the federal and state governments might not raise the UC or GIL problem at all, or might not raise it in the same way.¹²

A. *The Unconstitutional Conditions Argument*

Even if a benefit is constitutionally a "gratuity,"¹³ conditions on its grant might be subject to constitutional restraint. How can this be?

The answer has several parts. Both equality principles and several sorts of nonequality principles constrain the government from conditioning "gratuitous" benefits.¹⁴ But most of these principles do not invoke, or do not need to invoke, UC or GIL arguments. Put another way, most of these principles apply in virtually the same manner to "gratuitous" and "nongratuitous" benefits.

11. Similarly, Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP. CT. REV. 193, 198-99, confines his inquiry to government burdens and inducements that affect constitutional freedoms or choices. *Accord* Westen, *Rueful Rhetoric*, *supra* note 1, at 983 & n.7; Sullivan, *supra* note 3, at 1426. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1115 (1987), is concerned with "coercive" rather than "classifying" conditions, since the latter merely "define[] eligibility in terms . . . outside of the control of the potential recipients." *But cf. id.* at 1157-58, apparently interpreting "classifying" conditions more broadly as any absolute eligibility conditions, or any conditions that do not significantly affect conduct.

12. *See* Kreimer, *supra* note 1, at 1353-54 n.221. Although conditional federal grants to states might be analogous, they differ at least insofar as states do not assert individual liberty rights against the federal government. *See generally* Rosenthal, *supra* note 11.

13. *See, e.g.,* *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970).

14. In the broadest sense, a benefit is "gratuitous" if the government could constitutionally eliminate it. *See* Sullivan, *supra* note 3, at 1422. In that sense, however, virtually all things that people value in this world are "gratuitous." The government "could" eliminate all public spaces for speaking. It probably "could" forbid a wide variety of occupations and activities. And it probably "could" eliminate all private property prospectively. Indeed, probably the only "benefits" that the government is required to "confer" or "permit" are: affirmative private exercises of liberty, such as free speech; positive government systems of protection, such as due process guarantees within the criminal justice system; and negative governmental duties not to affirmatively act in certain ways, such as fourth and eighth amendment prohibitions.

Defining "gratuitous" benefits this broadly ignores possibly relevant distinctions between negative and positive duties, or benefits and burdens. It also ignores other important factors, such as the timing of the elimination of the "benefit," the individual's reliance and expectations, and the government's reasons for eliminating or preserving some state of affairs.

In this essay, I am discussing "gratuitous" benefits in a narrower sense, essentially as "New Property" benefits or government largesse rather than as traditional property interests or as independent liberty interests. *See* Reich, *The New Property*, 73 YALE L.J. 733 (1964); Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3 (1983). Perhaps exemptions from taxation or regulation should also be considered "gratuities." *See* Sullivan, *supra* note 3, at 1424 (defining such exemptions, as well as government largesse, as the "[t]wo basic sorts of government gratuities"). But this characterization question is not important to my thesis.

1. Equality Principles

Equality principles are the most obvious example of a constitutional constraint in which the status of the government benefit as a "gratuity" seems largely irrelevant.¹⁵ Even if a government is distributing a "gratuitous" benefit, such as a welfare benefit or a tax rebate, it must distribute the benefit "equally" in the relevant sense; it cannot distribute the benefit only to whites, or only to men, or only to an irrationally chosen subgroup. And an equalization in either direction (extension of the benefit to, or retraction from, both groups) comports with equality principles.¹⁶ Equality or "neutrality" principles may derive from constitutional provisions other than equal protection,¹⁷ but whatever their source, they apply regardless of whether the claimed inequality attaches to a "gratuitous" benefit or a "right."

I am therefore quite surprised that Kathleen Sullivan's recent, thoughtful analysis of unconstitutional conditions doctrine relies so heavily on equality principles.¹⁸ There is no special need to invoke the unconstitutional conditions doctrine when equality, neutrality, and antisubordination principles are adequate to the task.

15. See Simons, *Equality as a Comparative Right*, 65 B.U.L. REV. 387, 427, 446-49 (1985); Kreimer, *supra* note 1, at 1353 n.221.

16. Simons, *Equality*, *supra* note 15, at 427-34. Antisubordination principles, too, might share this general characteristic. That is, they might only require that the "benefit" be distributed so as not to subordinate a group; any distribution that so conforms is permissible. See Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447, 462 (1989). For example, providing a bonus only to military veterans might further the subordination of women; but providing a bonus either to all citizens or to none or (perhaps) only to women veterans might be a "nonsubordinating" distribution. See also Sullivan, *supra* note 3, at 1497-99 (discussing the similar concept of "preventing constitutional caste").

17. The first amendment's prohibition on policies that discriminate based on the "content" of speech is but one example. See generally Simons, *Equality*, *supra* note 15, at 423, 467-69.

18. Under the rubric of the unconstitutional conditions doctrine, Sullivan suggests three triggers for strict scrutiny. The second and third essentially involve inequality in the distribution of government benefits:

Second, an unconstitutional condition can skew the distribution of constitutional rights among rightholders because it necessarily discriminates facially between those who do and those who do not comply with the condition. If government has an obligation of evenhandedness or neutrality with regard to a right, this sort of redistribution is inappropriate. Third, to the extent that a condition discriminates de facto between those who do and do not depend on a government benefit, it can create an undesirable caste hierarchy in the enjoyment of constitutional rights.

Sullivan, *supra* note 3, at 1490 (emphasis original); see *id.* at 1496-99.

2. Nonequality Principles

Here, the “unconstitutional condition” doctrine has the following very abstract form. Government is not constitutionally required to distribute or confer the “benefit,” but if it does, it must distribute or confer “in accordance with the nonequality principle.” At least three categories of “nonequality principles” exist: impermissible deterrent effect, impermissible motive, and a residual category, inconsistent with the constitutional value. I discuss each category in turn.

a. Impermissible Deterrent Effect on a Right

Suppose the government offers citizens \$20,000 not to attend church or synagogue, in order to determine the strength of citizens’ religious beliefs. The result might be a significant decrease in actual religious practice. This policy would be unconstitutional, even though it involves a “gratuitous” benefit, because it has the substantial and unjustifiable effect of deterring exercise of a constitutional right.¹⁹ Or suppose the government offered welfare recipients an enormous benefit increase if, as in my original hypothetical, they remained silent for two days. The policy would be highly troublesome, in part because the poverty of the offerees might cause a high proportion of them to give up their rights.²⁰

This “impermissible deterrent effect” argument is often empirically questionable, however. Often most recipients or offerees would choose simply to forego the benefit, rather than forego the constitutional right. Moreover, a condition might be unconstitutional even if it does not appreciably deter constitutionally protected behavior. “A one dollar fine for choosing to be critical of the government . . . would be as clearly suspect as a one thousand dollar fine.”²¹ By the same token, even a one dollar tax rebate — a “gratuitous benefit” — for those who do not criticize the government would be unconstitutional.

b. Impermissible Government Motive

Suppose the government withdraws “gratuitous” benefits from a citizen because of hostility to her speech publicly criticizing the government. The withdrawal is plainly unconstitutional. And it illustrates that the prohibition on impermissibly motivated government

19. Also, government’s asserted reason for this policy might be illegitimate. See text *infra* at notes 22-23.

20. It would also be troublesome because it seems to exploit their economic vulnerability. For sources discussing the ways in which offers might exploit the weak, see *infra* note 66.

21. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1457 n.18 (2d ed. 1988). See also Kreimer, *supra* note 1, at 1319-20.

conduct applies equally to "gratuitous" and "nongratuitous" benefits.²²

Just what counts as "hostility" to, or an "intention to penalize," exercise of a constitutional right is a very difficult question. Sometimes, I suspect, the Court uses such expressions to describe not an actual improper purpose or mental state but government action that is inconsistent with the relevant constitutional values.²³ I now turn to that category.

c. *Inconsistent with the Relevant Constitutional Values*

This is my catch-all category for impermissible conditions on "gratuitous" government benefits that fit none of the other categories. In this category, courts often speak of the unfairness of putting the recipient to the choice, or of her paying an unwarranted price or penalty. And it is this category that most acutely raises the UC/GIL problem.²⁴

22. This example could also reflect an equality/neutrality principle, but it need not. For imagine that government withdraws benefits from anyone who speaks in public, regardless of what she says. To be sure, even this last example presents an "equality" problem in a sense, because the government is treating "speech" worse than "non-speech." Still, the main problem is not that government has created inequality, but that government is intentionally suppressing speech for no legitimate reason. See Simons, *Equality*, *supra* note 15, at 462-67.

Kreimer objects to the use of motive tests in allocative sanction cases. Kreimer, *supra* note 1, at 1333-40. Although I do not fully share that objection, I do agree that motive tests are not sufficient to explain the unfairness of some allocative sanctions. *Id.* at 1338-40.

23. For example, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Supreme Court held that the purpose to deter the influx of poor families who traveled to the state in order to get welfare assistance was impermissible, because it was simply a purpose to chill the exercise of a constitutional right. But of course the state never admitted to a purpose to chill the exercise of the right to travel as such. Rather, the state wanted to delay benefit payments to those travelers who had migrated with the purpose of getting higher benefits. Consider this variation on the facts: Suppose the state had deliberately excluded those who traveled to the state in order to commit a crime therein; the state's purpose, in a loose sense, is to deter the right to travel, but in a strict sense, it is to prevent crime. Presumably its more general purpose is to prevent crime on the part of travelers and residents alike.

Shapiro might be rightly decided, but the Court should have reasoned differently, as follows: (1) Persons have a right to travel for the purpose of obtaining welfare benefits — even if they might not have any right to travel for the purpose of committing a crime; and (2) the state's interest in excluding persons from seeking higher welfare benefits is inconsistent with that constitutional right.

24. Sullivan's test — strictly scrutinizing "any government benefit condition whose primary purpose or effect is to pressure recipients to alter a choice about exercise of a preferred constitutional liberty in a direction favored by government," Sullivan, *supra* note 3, at 1499-1500 — appears to ignore this category. For she seems to contemplate only those "effects" that deter exercise of a right. *Id.* at 1500-03. Similarly, Ep-

For example, the Court's reasoning in the classic UC case of *Sherbert v. Verner* does not essentially rely on any of the other categories.²⁶ To be sure, the Court does find that the exemption of Sunday Sabbatarians is discriminatory and compounds the unconstitutionality of the treatment of Mrs. Sherbert.²⁶ But this inequality argument does not seem essential to the Court's holding. I believe the Court would have reached the same result if both Saturday and Sunday Sabbatarians had been disqualified from receiving benefits.

Nor is *Sherbert* a clear case of "impermissible deterrent effect," notwithstanding some language to this effect in the Court's opinion.²⁷ Suppose the Court were convinced that the statute did not actually deter the exercise of the constitutional right to worship on the day of one's choice: all persons in Mrs. Sherbert's position would choose to give up unemployment benefits rather than give up the right to worship on Saturday. Again, I believe the Court would nevertheless have invalidated the statute. Nor is *Sherbert* a clear case of "impermissible motive": the rule might have been adopted and applied for permissible administrative reasons.²⁸

Thus, if *Sherbert* is correctly decided, it must be because the government is not permitted to put Mrs. Sherbert to this choice, to "penalize" her or make her pay a "price" for exercising a constitutional right. The most difficult question, I think, is the content of this category. What is the significance of the "gratuitousness" of the benefit, or its status as a "privilege" rather than a "right"? When is the government "withdrawing" a "benefit" rather than "threatening" a "penalty"? And what methodology should be used here?

One general approach is balancing. Peter Westen²⁹ and Albert

stein's analysis generally assumes that government conditions on constitutional rights significantly deter exercise of the rights. Epstein, *supra* note 3, *passim*.

25. 374 U.S. 398 (1963). Mrs. Sherbert, a Seventh-Day Adventist, was dismissed from her job because she refused to work on Saturday. Working on Saturday contravened her religion. The state board denied her unemployment benefits, reasoning that a job was "available" to her within the meaning of the unemployment statute. The Supreme Court held that the denial of unemployment benefits violated her right to the free exercise of religion.

Note that *Sherbert* does not involve an "explicit" unconstitutional condition, but a facially "neutral" condition ("Seek work every day of the week (except Sunday) if you want unemployment benefits."). Still, the condition implicitly divides recipients into two subclasses: Those who fail to seek work for religious reasons, and those who fail to seek work for all other reasons. The first subclass is subject to an "unconstitutional condition."

26. *Id.* at 406.

27. *Id.* at 404, 410.

28. Although the Court believed that that reason had weak factual support and was insufficiently compelling, the Court did not suggest that the reason could not actually have motivated the government. *Id.* at 406-09.

29. Westen, *Rueful Rhetoric*, *supra* note 1, at 988 (suggesting no special significance to a provision's status as an "unconstitutional condition on a gratuity"). For an earlier statement of this view, see French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234, 246-48 (1961).

Rosenthal³⁰ have endorsed this approach; Seth Kreimer³¹ and Richard Epstein³² have strongly criticized it. I largely agree with the criticisms, but I will not repeat them here.

Another approach, and the one that I will pursue, is to examine "baselines." To put the question crudely, has the government "penalized" the recipient by lowering her from some relevant baseline, or has it merely "withdrawn" an offer to improve her status compared to that baseline? In exploring this issue, I will defend the view that general baselines exist, which apply to many or most unconstitutional conditions cases and which do not ordinarily vary according to the constitutional interest at stake.³³ I think "offers" differ from "threats" whether the affected constitutional right is free speech, or freedom from unreasonable searches, or a substantive due process right of privacy or bodily integrity. Suppose, for example, the government offers money or a benefit increase if you remain silent for two days, or if you give blood, or if you choose to take your child to term instead of having an abortion, or if you agree to an experiment that would otherwise amount to an invasion of privacy or fourth amendment rights. In each of these cases, I will argue, a threatened reduction in government benefits for not giving up the relevant rights would be more problematic.

B. *The "Greater Includes the Lesser" Argument*

The above arguments might tempt one to accept without qualification the unconstitutional conditions argument: if the government could not impose the condition "directly," it should not be permitted to impose the same condition "indirectly," via a government grant. In *Sherbert*, the argument would be as follows: Since the government could not directly require Mrs. Sherbert to seek and accept Saturday work, or could not directly fine her for not working on Saturday, despite her religious beliefs, it could not require or induce this

30. Rosenthal, *supra* note 11, at 1121.

31. Kreimer, *supra* note 1, at 1347-51.

32. Epstein, *supra* note 3, at 12.

33. The religion clauses might be a partial exception to this principle. As Professor Marshall points out in this symposium, the combination of the free exercise and establishment clauses alters the permissible baseline of government benefits. Marshall, *Towards A Nonunifying Theory Of Unconstitutional Conditions: The Example of the Religion Clauses* 26 SAN DIEGO L. REV. 243 (1989). Indeed, the establishment clause is unique in forbidding the government from subsidizing an activity that is otherwise entitled to some constitutional protection. The issue arises most acutely when the government considers immunizing religious groups from an otherwise general regulation. Is immunity an establishment of religion? But is failure to immunize a penalty on free exercise?

indirectly, either.³⁴

But this position is too extreme. If we again consider the above doctrinal categories, we will see that in each, "indirect" infringements via government grants or benefits are sometimes less problematic than "direct" infringements.³⁵ In short, although the "greater includes the lesser" argument is overstated, there is something to it.

1. *Equality Principles*

Is there a relevant difference here? Is there any case in which a classification would violate equality principles if imposed "directly," but would not violate equality if attached to a government "benefit"?

Yes. A classification that would be unjustifiable if imposed directly might be permissible if imposed as a condition to a government benefit, if it is sufficiently tailored to the unique government benefit program. To use one of Kreimer's examples, a government arts program for painters could give grants to cubists but not pointillists, if program officials could make a plausible case that cubists have greater artistic merit.³⁶ But the government could hardly make it a crime to paint in a pointillist style.

Still, equality principles are not intrinsically different when applied to "gratuitous" government benefits rather than to other contexts. Although unique government justifications might be available in the case of government largesse, the degree of judicial scrutiny itself does not ordinarily vary.³⁷

2. *Nonequality Principles*

a. *Impermissible Deterrent Effect on a Right*

Sometimes the "indirect" condition is less "burdensome" than the "direct" one, in the behavioral sense: it may deter exercise of the right to a much lesser extent. In *Sherbert*, perhaps the situation is in fact as hypothesized above: the statute has no behavioral effect other than inducing all persons in Mrs. Sherbert's position to give up their unemployment benefits. By contrast, a criminal penalty for not seek-

34. The Court in *Sherbert* gave virtually this response, reasoning that "forc[ing] [appellant Mrs. Sherbert] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning the precepts of her religion in order to accept work, on the other hand . . . puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

35. See Sullivan, *supra* note 3, at 1422 n.22; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1448 (1968).

36. Kreimer, *supra* note 1, at 1374-75.

37. The obvious exception is the fundamental interest branch of equal protection analysis. See Simons, *Equality*, *supra* note 15, at 467-72, for a detailed analysis.

ing work on Saturday would certainly deter the exercise of the right much more.

b. Impermissible Motive

Perhaps the government is more likely to have a permissible motive in the "grant" or "benefit" context. The government may have sensible reasons for attaching conditions to benefits, conditions that may unfortunately, but not deliberately and impermissibly, burden constitutional choices. For example, suppose welfare benefits are only provided to current residents of a state. This policy may deter the right to travel out of state, but it is not so motivated. Compare a law that criminalizes travel out of state. It is much more difficult to discern a legitimate motive for this "direct" infringement.

c. Inconsistent with the Relevant Constitutional Values

Sometimes, apart from the above arguments, a government benefit program may legitimately affect constitutional rights in a way that a "direct" penalty may not. Consider a variation of *Sherbert*. Apart from an unemployment system, government could not directly require all citizens to seek work on pain of criminal penalty; but government can surely require citizens to seek work as a condition of obtaining unemployment benefits. Or again, society has a greater interest in preventing campaigning by government employees than in preventing campaigning by private employees, because of the special danger that elected officials will require their employees to assist their campaigns.³⁸

Again, this last category is the one in which UC and GIL issues arise most acutely. I will try to show that the offer/threat distinction helps identify the cases in which the condition on a government benefit is less troublesome than a directly imposed condition would be.

C. Distinguishing Three Concepts

1. Waiver and Consent

Do unconstitutional conditions cases necessarily involve waiver of a right or consent to its infringement? If the recipient is aware of the conditions and "chooses" the benefit anyway, does she have no cause to complain?

38. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973).

"Waiver" and "consent" are malleable and controversial concepts. They are not sufficient grounds for precluding every unconstitutional conditions claim.³⁹ Often recipients are not fully aware of the conditions; often they have a constricted practical choice; sometimes it is simply unfair for the government to put certain kinds of choices to them;⁴⁰ and some constitutional rights are entirely unwaivable or inalienable.⁴¹

2. Coercion

The concept of coercion is sometimes used loosely in this area, but it is usually inapposite. Under a strict definition of "coercion," a government actor "coerces" a recipient only if, among other things, the actor intends that she not exercise a right, and she in fact does not exercise the right.⁴² In *Sherbert*, for example, the government did not really "coerce" Mrs. Sherbert to violate her religious convictions, since there is no reason to believe that the motivation for adopting a uniform policy requiring Saturday work was to induce religious persons to give up their Sabbath. Mrs. Sherbert did suffer a kind of "penalty," however, and that penalty still might constitute an unconstitutional condition. Courts sometimes appear to use "coercion" as a term of art for "penalty."⁴³ That usage is innocuous as long as it is understood to be somewhat hyperbolic.

Although the concept of coercion usually does not strictly apply, I will later review a number of philosophical discussions of coercion, because those discussions carefully explore the distinction between threats and offers.

3. Refusal to Subsidize

The abortion funding cases⁴⁴ are sometimes described as unconstitutional conditions cases.⁴⁵ If the government refuses to fund abortion, the argument goes, then it is conditioning otherwise available

39. See generally Kreimer, *supra* note 1, at 1382-93; Rosenthal, *supra* note 11, at 1153-54.

40. See Westen, *Rueful Rhetoric*, *supra* note 1, at 1012-15.

41. See Kreimer, *supra* note 1, at 1386-90. See generally Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987). For example, the government may not purchase your right to vote, or bribe you to be a slave. Kreimer, *supra* note 1, at 1386. Professor Sullivan persuasively argues that no theory of inalienability can explain all unconstitutional conditions cases. Sullivan, *supra* note 3, at 1476-89. But I agree with Kreimer that such a theory can explain a subset of cases.

42. See generally Westen, "Freedom" and "Coercion" — *Virtue Words and Vice Words*, 1985 DUKE L.J. 541 (1985); A. WERTHEIMER, COERCION 202-03 (1987). See also Sullivan, *supra* note 3, at 1454-56.

43. See, e.g., *Speiser v. Randall*, 357 U.S. 513, 519 (1958). See also Sullivan, *supra* note 3, at 1435-36.

44. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

45. See, e.g., Sullivan, *supra* note 3, at 1439-40.

medical benefits on the recipient's nonassertion of a constitutional right. But I agree with Professor Tribe and others that a "refusal to subsidize" is different from a classic unconstitutional condition.⁴⁶

Consider two examples that illuminate the difference. First, a classic unconstitutional condition issue would arise if the government paid for both abortion and childbirth, but gave an extra bonus for those who chose to carry a child to term. The bonus might or might not be valid, but it would indeed raise the unconstitutional condition issue directly. By contrast, a refusal to fund abortions does not condition any government "benefit" other than the benefit of reimbursement for the medical cost of exercising the constitutional right. If the pregnant woman does not have the abortion, she does not incur that medical cost, so it is a little odd to say that a "benefit" has been conditioned on her nonassertion of a right to an abortion.⁴⁷

A second example of a classic unconstitutional condition issue is a government policy denying food stamps to women who obtained abortions. Indeed, curiously enough, a withdrawal of a government benefit worth less to the woman than government funding of abortions could be unconstitutional. Suppose the government pays for abortions and childbirth, but imposes a one time, fifty dollar reduction of welfare benefits if a woman obtains an abortion. Even the *Maier* and *Harris* Courts would have invalidated such a plan!⁴⁸

Refusals to fund do raise serious constitutional issues. When they are selective, they raise equal protection issues. And sometimes the government has some affirmative duty to fund exercise of a constitutional right.⁴⁹ But refusals to fund need to be analyzed somewhat

46. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 781-82 (2d ed. 1988); Tribe, *supra* note 4, at 254-56.

47. See Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985). Or consider the example given in *Harris*, 448 U.S. at 318. A citizen has a constitutional right to attend private schools if she wishes; the government nevertheless may constitutionally fund public but not private schools. This is not an unconstitutional condition because the citizen is "penalized" only in the sense that the government does not pay for her exercise of the constitutional right.

48. See *Maier*, 432 U.S. at 474 n.8 ("If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in *Shapiro* [v. Thompson, 394 U.S. 618 (1969)], and strict scrutiny might be appropriate But the claim here is that the State 'penalizes' the woman's decision to have an abortion by refusing to pay for it."); *Harris* 448 U.S. at 317 n.19.

49. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (government must waive filing fees for divorce, since it monopolizes the legal institution of marriage and divorce); see also Tribe, *supra* note 4, at 257-59 (arguing, based on *Boddie*, that government has affirmative duty to fund abortions for poor women even if it does not provide

differently than true unconstitutional conditions.

PART III

THE THREAT/OFFER DISTINCTION, AND ITS SIGNIFICANCE

A. *Unpacking the Threat/Offer Example*

Recall the earlier hypothetical example of a government experiment that randomly selects a group of citizens to explore the effects of their remaining silent for two days. I compared an offer or bribe, by which citizens who remain silent receive a \$200 tax reduction, to a threat, by which citizens who choose not to remain silent receive a \$200 tax increase.

Why is the offer constitutional, while the threat is unconstitutional? In either case, it costs the individual \$200 to speak those two days, either by giving up the opportunity for a tax break, or by suffering a tax penalty.

I will examine several possible explanations in turn.

(1) Perhaps people value the loss of an opportunity less than they value the loss of something they already have. This sounds reasonable, at first glance. Indeed, it finds support in the economic literature.⁵⁰

But the argument is insufficient. For suppose the offer were increased to a \$1,000 bribe, while the threat remained at \$200. The bribe would still be permissible, while the threat would not be. Indeed, the disparity could be increased even further, yet we would still object much more to the threat.

(2) Perhaps the threat is more objectionable because it puts more actual pressure on the constitutional right, in the following sense: More people will in fact choose not to assert their constitutional right to speak if they are penalized for speaking than if they are merely rewarded for not speaking.

But again, the argument is insufficient. For the threat is more troublesome than the offer even if we are confident that the behavioral consequences are identical; for example, suppose both a threat of losing \$200 if you speak and an offer of receiving \$200 if you remain silent will cause sixty out of 100 persons to remain silent.

any other free medical assistance, because otherwise the right is meaningless); Tushnet, *The Supreme Court on Abortion*, in *ABORTION, MEDICINE AND THE LAW* (J.D. Butler & D. Walbert eds. 1986) (decision not to subsidize the poor may constitute a "burden" because government allocates most of the goods that the poor consume).

50. See C. GILLETTE & T. HOPKINS, *FEDERAL AGENCY VALUATIONS OF HUMAN LIFE: A REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES* 49-50 (Dec. 1988) (citing Knetch & Sinden, *Willingness-to-Pay And Compensation Demanded: Experimental Evidence Of An Unexpected Disparity In Measures Value*, 99 Q.J. ECON. 507 (1984); Kelman, *Consumption Theory, Production Theory, And Ideology in the Coase Theorem*, 53 S. CAL. L. REV. 1187 (1980)).

Indeed, the threat is more troublesome even if the behavioral consequences are somewhat "worse" under the offer; for example, suppose a larger offer of \$1,000 will cause eighty out of 100 to remain silent, while the threat of loss of \$100 will cause fifty out of 100 to remain silent.⁵¹

(3) Perhaps the recipient's response to the offer is more "voluntary" than her response to the threat.

Again, this is unpersuasive. In each case, the citizen has a real choice, and she will suffer the same financial consequence from choosing speech. "Voluntary" might describe the more complex concept of a fair choice, but if so, I think it clearer to analyze the fairness of the choice directly, as I do below.

(4) Perhaps the offer increases the citizen's options, while the threat decreases them.

This is a common explanation of the threat/offer distinction.⁵² Strictly speaking, however, the explanation fails. Although the offer gives the citizen a "new" option of receiving money if she declines to speak, it also imposes a "new" penalty, for it imposes on the citizen who chooses to speak an opportunity cost that did not previously exist. She now lacks an option she once had — the option of speaking without the temptation or inducement to increase her welfare by remaining silent. To be sure, such an opportunity cost is more ethereal than a penalty that actually lowers her welfare. But to deny that it is a real cost seems to beg the question.

The argument that the offer increases one's options might refer, not to the novelty of the option, but to the fact that citizens will

51. See A. WERTHEIMER, *supra* note 42, at 204 ("It is important to see that the distinction between threats and offers is *not* a function of the *distance* between the options or their *efficacy* in securing the desired response.") (emphasis original).

There are two other problems with the argument. First, the argument is a contingent empirical assertion which in some circumstances may be false. Second, the relative payment amounts could easily be adjusted (as in argument (1), above) to equalize the incentives.

52. See, e.g., Kreimer, *supra* note 1, at 1354; A. WERTHEIMER, *supra* note 42, at 211, 232; J. FEINBERG, HARM TO SELF 230 (1986).

Professor Day has stated this argument in more sophisticated form. If I understand him, he would translate the argument as follows: Prior to the threat (b), the citizen can unconditionally keep both her present level of taxes and her freedom to speak, whereas after the threat she cannot do both of these things. By contrast, prior to the offer (a), she cannot unconditionally keep both the offered tax break and her freedom to speak. In order to get the offered tax break, she must give up her freedom. So the "offer does not make [her] unable to do something [she] can unconditionally now do." But the government's threat (b) "deprives [her] by making [her] (about to be) unable to do something which [she] can unconditionally now do." Day, *Threats, Offers, Law, Opinion and Liberty*, 14 AM. PHIL. Q. 257, 259 (1977) (emphasis original).

ordinarily prefer the option to the threat. As Robert Nozick explains in his classic article, people ordinarily welcome offers but not threats.⁵³ This psychological fact is indeed relevant to the justification behind the threat/offer distinction. But I think the insight within this fourth argument is better explained differently, as reflecting that the government's use of the threat is presumptively unfair. See arguments (7) and (8), below.

(5) Perhaps the "penalty" is objectionable because it creates inequality between those "random conscripts" subject to the condition and all other citizens.

But so does the "offer." And even if inequality with respect to burdens is more objectionable than inequality with respect to benefits,⁵⁴ the hypothetical could be altered to eliminate this objection: (a) all citizens would be eligible for the offer if they remain silent, versus (b) all citizens would be subject to the penalty if they speak. I originally hypothesized a random selection device only to make the example seem more realistic.

(6) Perhaps government is less constrained when it is acting in a proprietary capacity, like a private actor. The offer is something that a private individual could provide. This is even clearer if the government offer is in the form of money, rather than a tax break. By contrast, a private individual could not threaten an individual in the same way, for the private individual lacks a general power to coerce or tax.⁵⁵

But I am unconvinced. The offer/threat distinction seems robust even when the government is offering a uniquely governmental benefit. Suppose the government increases food stamp benefits by a certain amount, or lowers taxes by that amount, if beneficiaries/taxpayers agree never to have an abortion. This is an offer, as compared to lowering benefits or increasing taxes if beneficiaries/taxpayers do have abortions. But a private individual cannot offer food stamps or tax relief, so the offer is not a "proprietary"-type power.⁵⁶

(7) Perhaps the government has no legitimate interest in employing a threat when it could use an offer. Its only actual interest is a selfish desire to save money. After all, the government seeks some

53. Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE, AND METHOD* 440, 460 (S. Morgenbesser, P. Suppes & M. White eds. 1969).

54. See, e.g., Simons, *Overinclusion and Underinclusion*, *supra* note 16, at 506-09.

55. I thank Joseph Brodley for this suggestion.

56. See also Kreimer, *supra* note 1, at 1315-24, for several cogent criticisms of the sovereign/proprietary distinction: government can deter just as effectively with fines or withdrawal of monetary benefits as with direct imprisonment or taxation; proprietary sanctions are often larger than sovereign ones; proprietary sanctions are easier to apply because the recipient seeks out the government; and even the most "private" of government enterprises is ultimately backed up by taxes.

benefit from the exchange, to wit, information that will benefit society. It is exploiting the citizenry.⁵⁷ And, for that reason, citizens might understandably experience the threat as a qualitatively more severe burden or penalty than they would experience the corresponding offer.

This, I agree, is a significant point. And the point remains significant if, instead of viewing the "government" as a distinct entity, we view it as the collection of citizens who are taxed to pay the offer, or who receive a tax benefit as a result of the penalty. In the case of the offer, the cost of inducing silence is distributed across the general population; in the case of the threat, that cost is concentrated upon the "conscripts," and the general population receives a commensurate financial benefit. Since the social benefit of the program accrues to the public generally, *prima facie* the offer distributes the financial cost of the program more fairly.⁵⁸

But by the same token, if the government has exhausted the offer approach without success, it then has much better reason for employing the threat approach.⁵⁹ Suppose the government tried to bribe people not to speak, but almost no one accepted the bribe, even a very large bribe. Then the government has a much better case for "drafting" some people not to speak, and penalizing them if they refuse to do so — assuming that this will in fact induce more people to comply. This point still underscores that the offer is much less troublesome. In doctrinal terms, perhaps the government should only be permitted to use a threat if it can show that the "less restrictive alternative" of an offer is inadequate.⁶⁰

(8) Perhaps the citizen has "given" the government something in this hypothetical, so she deserves something in return. The threat scenario is upsetting because the government "gets something for nothing."⁶¹ Again, the government exploits its citizens.

57. See Kreimer, *supra* note 1, at 1372 ("This [prediction] baseline has the happy property of forcing the government to pay fair measure for the forfeiture of rights. It cannot purchase rights by granting benefits that the victim would receive anyhow.").

58. See also Epstein, *supra* note 3, at 25 (implicitly arguing that the unconstitutional conditions doctrine should properly serve distributive justice as well as allocative efficiency); McConnell, *Unconstitutional Conditions: Unrecognized Implications For The Establishment Clause*, 26 SAN DIEGO L. REV. 255 (1989) (emphasizing that government largesse is ultimately derived from broad-based taxation).

59. I thank Clayton Gillette for this point.

60. For a general analysis of the "less restrictive alternative" doctrine, see Simons, *supra* note 16, at 485-88. An offer would ordinarily be "less restrictive" in the sense of imposing a lesser burden, not in the sense of restricting an appropriately smaller class. See *id.* at 488.

61. See Frankfurt, *Coercion and Moral Responsibility*, in *ESSAYS ON FREEDOM*

This, too, is a sound objection. Compare our reactions to the following examples. The city of Boston might offer a "bribe" not to drive in Boston, or it might charge a toll for driving in (or into) Boston. But the second option does not seem especially "threat"-ening, even though it affects a "right to travel," because the driver imposes costs on the city. Or consider the government's imposition of a marriage license fee to defray administrative costs. This burden on the right to marry is hardly objectionable.⁶²

Of course, the government can require citizens to "give something for nothing" in some circumstances, namely, civic obligations of military service and jury duty.⁶³ The rationale, in part, is that citizens get innumerable benefits from the government. If unlimited, this rationale would obliterate the threat/offer distinction and would allow an unlimited degree of "conscription" of citizens. I can only respond that that prospect is a very unhappy one in a constitutional democracy that respects individual liberties.

In sum, a threat is more troubling than the corresponding offer for the following basic reason: The threat is exploitative, at least when the affected citizenry have neither received a reciprocal benefit nor contributed to the social problem that the threat or offer is designed to remedy. The next section elaborates on this conclusion.

B. The Significance of the Threat/Offer Distinction

The threat/offer distinction expresses this basic norm: If the government wishes to induce conduct that a citizen has a right not to engage in, government needs a greater justification for burdening those who stand on their rights than for benefiting those who give up their rights. And this is true regardless of how laudable or important the government's goal is.

More precisely, I conclude that the threat to reduce otherwise available government benefits, or to increase otherwise required tax burdens, if a recipient asserts a right is more constitutionally troublesome than the offer to increase otherwise available government

OF ACTION 65, 83 (T. Honderich ed. 1973) ("A threat, unlike an offer, exposes a person to the risk of an additional penalty without providing him with any opportunity to acquire a benefit which would otherwise not have been available to him.").

62. Indeed, the corresponding offer would probably be unconstitutional, precisely because it does not reflect costs created by the citizen. Imagine that a marriage registry office offered a small bribe to would-be married couples to induce them not to marry. Although this peculiar policy would rationally serve the interest of lowering government administrative costs, it is not properly linked to the costs that the citizens' actions (*not* getting married) impose on government.

63. The government does pay military and jury conscripts, but it relies on compulsion and legal duty rather than a market rate to induce service. (The volunteer military service is an exception.) Indeed, the government could probably require jury and military duty without any pay.

benefits, or to reduce otherwise required tax burdens, if a recipient does not assert a right. Of course, offers can still be unconstitutional,⁶⁴ and threats can still be constitutional. But the threat should be subject to higher judicial scrutiny than the offer. At the very least, the government should not be permitted to employ the threat if the (less restrictive) offer is a reasonably effective alternative. Moreover, the threat to lower someone's "gratuitous" benefits should ordinarily receive the same searching scrutiny that a direct regulation of the person's conduct would receive. So in my "threat to speech" example, judicial scrutiny should ordinarily be just as strict whether the government increases taxes, reduces otherwise available welfare benefits, or imposes a civil or criminal fine for refusing to remain silent for two days.⁶⁵

Why is the threat more troublesome? The prior discussion suggests an answer. The government exploits⁶⁶ its citizens and treats them unfairly when it extracts a contribution from them without either (a) offering a reciprocal benefit in return, or (b) demonstrating that they have contributed in a distinct way to the problem they

64. Consider the earlier example of the government offering citizens \$20,000 not to attend church or synagogue. Or consider Kreimer's illustration of the hypothetical "prediction" test, a test which I otherwise endorse. Kreimer supposes that a city will build a highway on Route 1 or Route 2. Route 2 is more technically desirable, and the planners recommend it to the mayor. But this route also will greatly ease newspaper distribution for the major city paper, which is critical of the mayor. The mayor announces that he will choose Route 1 unless the paper stops criticizing him, in which case he will choose Route 2. This is a threat, Kreimer explains, because the city would have gone with Route 2 anyway. Now change the assumptions: suppose Route 1 was technically better and would have been chosen "in the normal course of events." If the mayor makes the same announcement, he is making an offer. Kreimer, *supra* note 1, at 1371-72.

I agree with Kreimer's analysis here of the distinction between threats and offers. But the example is ill-chosen, because even the offer is probably unconstitutional. The city cannot even offer a positive inducement to the paper if the city's purpose is to quell criticism.

65. Whether a proposal is an offer or a threat might also be relevant to whether the constitutional right has been burdened. That is, "withdrawing an offer" might not be considered a burden at all, while "imposing a threat" might be considered a clear burden. But I do not pursue this issue here. For a different proposed criterion of when the burden threshold has been met, see Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

66. I use the term "exploitation" somewhat loosely. Although philosophers have defended a number of specific conceptions, the conceptions usually include the notion that one party has taken advantage of another party's weakness or dependency. For some discussions, see J. FEINBERG, HARM TO SELF 242-49 (1986); Feinberg, *Noncoercive Exploitation*, in PATERNALISM 201-35 (R. Sartorius ed. 1983); A. WERTHEIMER, *supra* note 42, at 225-41. That notion seems apt when a government increases taxes or reduces benefits in order to induce desired conduct, at least when it could employ the less restrictive alternative of an offer.

have been “drafted” to remedy.⁶⁷ And if we characterize the “exploiting” party not as “the government” in some detached sense, but as the group of citizens and taxpayers that government represents, the unfair treatment point is simply reformulated: judicial scrutiny should be greater when the general population has extracted social benefits from a subgroup without offering some specific benefit in return or without proof that the subgroup has helped cause the problem.

Consider some exceptions that “prove” this general rule. In takings law, citizens can fairly be asked to accept zoning restrictions that promote an “average reciprocity of advantage,” that is, that are to the benefit of all persons subject to the restriction.⁶⁸ But it would stretch that principle too far to say that every government program that employs a threat to serve a legitimate end is to the benefit of all citizens. In my “threat to speech” example, those who choose to speak will usually pay a price that is highly disproportionate to the benefits they receive from the experiment. Or again, government probably may require those who wish to engage in large public rallies to pay some reasonable proportion of the clean-up costs, assuming that the policy is nondiscriminatory. Indeed, paradoxically, the comparable offer is more troublesome: I doubt that it would be constitutional for the government to offer a bribe to the organizers of the rally to induce them to cancel it!

The baseline for measuring threats and offers, as I will shortly explain, is roughly this: What the government would have provided the citizen apart from the condition, that is, if it could not impose the condition. At first glance, this baseline seems perplexing. It seems to derive an “ought” from an “is.” That is, it seems to base the moral and constitutional distinction that threats are more troublesome than offers on how government normally would have acted, not on how government should have acted. And I am old-fashioned enough to believe that an “ought” cannot be derived from an “is.” What, then, is the explanation?

Basing the threat/offer distinction on what the government would normally have done does not derive an “ought” from an “is.” Rather, it merely recognizes that government threatens liberty more acutely when government takes a step that newly burdens those who stand on their rights than when government takes a step that newly benefits those who give up their rights. Or, to put the matter a little differently, once the government legitimately sets a baseline for benefits and burdens, the individual has a qualified kind of entitlement

67. Although (a) and (b) are two important categories in which “threats” are not especially troublesome, other categories that I have not identified might also exist.

68. See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987) (discussing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 459 (1922)).

to that baseline — in the special sense that government ordinarily needs as strong a reason for lowering the individual from the baseline as it needs when it directly punishes or regulates.⁶⁹ To fully explain this point, however, requires a closer look at the requisite baseline.

C. *The Hypothetical Descriptive Baseline*

The appropriate baseline for measuring threats and offers is both hypothetical and descriptive. Government threatens a citizen if it proposes to condition the continuation of the benefits/burdens she would otherwise receive on her not doing *X*, when she has a right to do *X*. That is, if she does *X*, her benefits will decrease or her burdens will increase as compared to what she would otherwise receive. But government makes an offer if it proposes to condition an increase in benefits or a decrease in burdens she would otherwise receive on her not doing *X*.

A critical term here is "otherwise." How do we determine what the recipient would "otherwise" receive? What is being excluded from the situation, and what is being included? Philosophers and legal writers who have studied the necessary and sufficient conditions of coercion⁷⁰ have described the hypothetical baseline with such varied terms as "normal," "statistical," "predictive," "expected," and "nonmoral,"⁷¹ and many have struggled with this problem of definition.⁷² Suppose that *P* is in a position to save *Q*, who is drowning. *P*

69. This also answers one of Sullivan's objections to a "coercion" theory. She persuasively argues that a normative concept of coercion is a doubtful solution to the unconstitutional condition problem, since that problem only arises when the benefit is constitutionally gratuitous: "[t]o hold that conditions coerce recipients because they make them worse off with respect to a benefit than they *ought* to be runs against the ground rules of the negative Constitution on which the unconstitutional conditions problem rests." Sullivan, *supra* note 3, at 1450 (emphasis original). I agree. But the argument simply demonstrates that the threat/offer baseline should be what the recipient otherwise *would* have received, not what she otherwise *ought* to have received. For further discussion, see *The Hypothetical Descriptive Baseline*, *infra* text at notes 70-85.

70. As noted above, I am not supposing that the government literally coerces citizens when it employs a threat rather than an offer. See *supra* text at notes 42-43. The philosophical literature is nevertheless illuminating, since the analysis of baselines is an important part of the analysis of coercion.

71. See J. FEINBERG, HARM TO SELF 216-28 (1986) (endorsing a "statistical" or "expectation" baseline); Nozick, *supra* note 53 ("normal," "expected," and "predicted"); A. WERTHEIMER, *supra* note 42, at 206-11 (discussing two kinds of "nonmoral" baselines — the "statistical" and the "phenomenological"); Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121 (1981) ("normally expected course of events").

72. See, e.g., Nozick, *supra* note 53, at 451-52; A. WERTHEIMER, *supra* note 42, at 206-22; Zimmerman, *supra* note 71, at 124-38; J. FEINBERG, HARM TO SELF 216-28

offers to save *Q* but only if *Q* pays *P* a large sum of money. Has *P* made an offer or a threat?⁷³ Or suppose that *R* ordinarily beats his slave *S* every day, for no reason.⁷⁴ One day, *R* proposes not to beat *S* if *S* will perform a slightly disagreeable task. Has *R* made an offer or a threat?

I believe that the most appropriate test is what the proposer would have done *if he had not been permitted to attach to his offer the condition to which the recipient objects*.⁷⁵ So *P* has made an offer if, in this hypothetical world where the conditioned offer was prevented, he would not have saved *Q*. On the other hand, if in this counterfactual world he *would* have saved *Q*, then his attaching an extra condition is a threat. On this view, *R* has clearly made an offer to *S*, because if the conditioned proposal were not permitted, *R* would otherwise have beaten *S*, and the proposal is an improvement relative to that baseline. Finally, in my original example, the proposal to grant tax relief if the citizen agrees to remain silent is an offer because, if the government could not impose the condition of not speaking, it would not have granted unconditional tax relief; it is offering that relief only to induce silence. And the proposal to increase taxes if the citizen does not agree to remain silent is a threat because, apart from that condition, the government would not have increased taxes.⁷⁶

(1986); C. FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 95-97 (1981).

Surprisingly, however, many scholars who have discussed this hypothetical descriptive baseline have been somewhat casual about how to identify what the proposer would otherwise have done. See, e.g., Lyons, *Welcome Threats and Coercive Offers*, 50 PHIL. 425, 436 (1975) ("Q knows that P would have given x to Q, on easier terms, if the chance had not arisen to trade x for y"); Westen, *supra* note 42, at 588-89 (the descriptive test asks what the recipient would "otherwise" expect her situation to be, "in the absence of [the proposal]").

73. For a careful discussion of this example embracing four different possible "baseline" criteria, see J. FEINBERG, *HARM TO SELF* 220-21 (1986).

74. The example is from Nozick, *supra* note 53, at 450. It has prompted much discussion. See Westen, *supra* note 42, at 582-86; Zimmerman, *supra* note 71, at 126-31; J. FEINBERG, *HARM TO SELF* 221-22 (1986); A. WERTHEIMER, *supra* note 42, at 208-09.

75. Strictly speaking, we should add to the underlined phrase something like the following: "Or a similarly objectionable condition." Thus, if, counterfactually, *P* were not permitted to demand a large sum of money from *Q* for rescuing him, then obviously he would have demanded a slightly smaller sum of money. This type of alternative proposal should also be excluded, for we want to know what *P* would have done if he could not charge any sum of money for rescuing *Q*. But I recognize that I have not defined this additional qualification precisely.

76. The test that I propose is very similar to the "predictive" prong of Kreimer's test for distinguishing threats from offers. See Kreimer, *supra* note 1, at 1371-74. In Kreimer's words, "the normal course of events is the course of events that would follow if the government could not impose the condition in question, *or could not take the exercise of constitutional rights into account*" (emphasis added). I differ from Kreimer slightly, for I would omit the italicized phrase. The relevant question, I think, is whether the particular condition actually imposed is unconstitutional, so that should be the focus of the hypothetical inquiry. Whether the government could take the exercise of constitu-

This analysis prompts several objections. First, how can the analysis of threats and offers ignore the immorality or illegality of the baseline? *R* has no right to beat *S*, even if that is what he normally does. Slavery and brutality are immoral. This objection is important, but ultimately unconvincing. Of course *S* has a right that *R* not beat him, and a right not to be enslaved. So *S* has a right not to be at that baseline. Yet that is a different issue from whether, given that baseline, the proposal is a threat or an offer. *S* can directly assert the right not to be at the baseline, but we should not confuse matters by claiming that that is relevant to whether he has suffered a threat or instead received an offer. For example, if *R* were to propose to beat *S* twice as hard as usual for refusing to perform the disagreeable task, that would be more problematic (a threat) than his actual proposal not to beat *S* if *S* does perform the task (an offer).

Consider the same objection in relation to another example. Suppose prison officials place a troublesome prisoner in solitary confinement and impose horrendous conditions that violate the eighth amendment. They propose to release him from confinement, however, if he agrees to assist them in uncovering crimes committed by other inmates. Again, the proposal is an offer, relative to the unfortunate baseline. (Compare this to a threat to worsen his conditions of incarceration if he refuses to help.) It is the original baseline, and not the new proposal itself, that makes the victim worse off than he is entitled to be. The victim should directly claim his entitlement not to be at that baseline. But the government's failure to honor the original entitlement does not convert the new proposal from an offer into a threat.⁷⁷

A second objection to my analysis is more troubling. It is not merely difficult to know what the proposer would have done if he

tional rights into account in any other way, with a different condition, is not directly relevant.

77. In terms of the philosophical debate, I am arguing for a "nonmoral" rather than a "moral" baseline. See J. FEINBERG, *HARM TO SELF* 216-28 (1986); Zimmerman, *supra* note 71, at 124-31; A. WERTHEIMER, *COERCION* 206-11 (1987); see also Seidman, *supra* note 3, at 78-79. However, the "nonmoral" terminology does not mean that the threat/offer distinction itself is not of moral significance. See my discussion of deriving an "ought" from an "is," *supra* text at note 69.

Some scholars have argued for a baseline that is partly or entirely normative rather than descriptive. See, e.g., A. WERTHEIMER, *supra* note 42, at 204-31; Westen, *supra* note 42, at 576-77, 582-89; Nozick, *supra* note 53, at 447, 450; C. FRIED, *supra* note 72, at 97. That position may be sensible as part of a definition of *coercive* threats; for not all threats are coercive. See A. WERTHEIMER, *supra* note 42, at 214 (noting Haksar, *Coercive Proposals*, 4 POL. THEORY 65, 67 (1976)). But that position is especially doubtful as applied to the unconstitutional conditions problem. See *supra* note 69.

could not have made the conditioned proposal; the question may even be incoherent. Maybe *P* is the kind of person who always tries to make money from the distress of others. If that were forbidden to him, what would he do? Or consider an example closer to our legal hearts: A governor proposes to commute a sentence if the prisoner agrees to participate in dangerous medical experiments. Would the governor have commuted the sentence "otherwise," that is, if she knew she was forbidden from making the conditioned offer? We can imagine clear polar cases. An offer: She had never commuted a sentence before, and this new policy is the only ground that she has ever thought sufficient for commutation. A threat: She has a definite set of criteria, other than participation in an experiment, that she has always used before, and the prisoner would have been entitled to commutation under that policy. But what is the proper analysis for cases between these extremes?

The last example reveals a third potential problem with the hypothetical descriptive test. Isn't the proposer entitled to change his criteria over time? History should not be a straightjacket. If the proposer has legitimate reasons for changing the baseline level of benefits and burdens, then how can we make sense of what the recipient would "otherwise" have received?

This "shifting sands" objection is overstated, however. Sometimes we can indeed apply the hypothetical test, even though the underlying baseline might shift. The hypothetical test is not a historical one.⁷⁸ Consider the following two examples that elaborate upon the original hypothetical.

(1) *The shifting sands offer*: The government announces that all welfare beneficiaries who agree to remain silent for two days will get a \$200 benefit increase next year. But it also announces that, in addition to this first condition, all benefits shall be decreased by \$200 next year across the board. The beneficiary has received an offer, even though the net effect is that beneficiaries who remain silent get

78. In this respect, my test differs from Kreimer's. Kreimer would allow history to be an important (though not determinative) factor in determining the appropriate baseline. Kreimer, *supra* note 1, at 1359-63. My proposed test, instead, relies essentially on what Kreimer calls the "predictive" test. *Id.* at 1371-74.

I also reject Kreimer's partial reliance on an equality baseline for differentiating threats from offers. As Kreimer explains: "The normal course of events, under this interpretation, is the course of events that is the statistical norm: what happens to everyone else. . . . [T]he more a government's . . . choices tend to single out for exclusion from otherwise available benefits those who exercise a particular right, the more that choice appears to penalize that exercise." Kreimer, *supra* note 1, at 1363-67. Yet this analysis seems parasitic on the "prediction" test: the right is "singled out" only in the sense that, but for exercise of the right, we can predict that the government would have offered the benefit. See also Simons, *Equality*, *supra* note 15, at 448 n.138. Of course, in some cases equality principles such as equal protection directly apply, but then the "gratuitous" status of the benefit is ordinarily irrelevant. See *supra* text at notes 15-18, 36-37.

the same benefits next year as this year, while beneficiaries who stand on their rights get a smaller benefit. It is an offer so long as the government really did have valid, independent reasons for applying the across-the-board decrease. And it is an offer because the government will place her in a better position than she would otherwise have occupied *next year* if she waives her right. The government will not be placing her in a worse condition than she otherwise would have occupied next year if she refuses to waive her rights.⁷⁹

Note that under a purely historical baseline, she has been threatened. Such a baseline is unpersuasive, for it forbids the government from changing its policies over time. As Professor Westen explains, "[t]he question is not whether the proposal conditionally promises to leave a recipient worse off than he *is*, or worse off than he *has been*, but whether it conditionally promises to leave *him* worse off than he otherwise will be."⁸⁰

(2) *The shifting sands pseudo-offer*: As before, the government purports to offer a \$200 benefit increase if the recipient agrees to remain silent, and independently to reduce benefits \$200 across-the-board compared to this year. But actually, it never had any independent reason for the reduction. Now, the government really is using the threat method rather than the offer method. The result is the same as in the first example, in one sense: The recipient's benefits will be the same as last year if she agrees to waive her rights, and \$200 lower than last year if she does not agree to waive her rights. But the absence of any legitimate, independent reason for the benefit decrease transmutes the offer into a threat.⁸¹

The test is nonhistorical with respect to not only the level of bene-

79. To be sure, she will *not* be better off *than this year* as a result of waiving her rights, since she will get the same level of benefits. And she will in fact be worse off *than this year* if she refuses to waive her rights, since her benefits will decrease. But these are not the relevant comparisons.

80. Westen, "*Freedom*" and "*Coercion*," *supra* note 42, at 579 (emphasis in original). Other commentators also support a predictive rather than historical baseline. See A. WERTHEIMER, *supra* note 42, at 205; Benditt, *Threats and Offers*, 58 THE PERSONALIST 382 (1977) (a threat includes, inter alia, the proposal: "I will prevent your present situation from improving unless you do A"); Frankfurt, *supra* note 61, at 69. Westen and these other commentators do not restrict their analysis to governmental "proposers."

81. Consider French's analysis of *Speiser v. Randall*, 357 U.S. 513 (1958). French claims that one cannot easily distinguish a penalty from a withdrawal of a benefit, because "there would be an identity of effect whether the state imposed a uniform tax increase concurrent with an equivalent exemption for all persons signing loyalty oaths, or merely imposed a special tax on all non-signers." French, *supra* note 29, at 246. But despite the identity of effect, ordinarily the exemption is an offer and the special tax is a threat, for the reasons explained in the text.

fits, but also the imposition of the condition, though the two are interrelated. If the government has provided a \$200 tax rebate to each citizen the last several years, it may nevertheless offer the rebate this year only to those who remain silent for two days, without having the offer characterized as a threat — so long as the government really had decided independently not to continue the across-the-board rebate.⁸²

Note that the test is a hypothetical judgment about what the proposer would otherwise provide, not a judgment about what the offeree or victim expects that she will otherwise receive.⁸³ Although these judgments will usually be the same, they will differ if the recipient is mistaken about what the government is otherwise planning to do. So, in the first shifting sands example above, if the recipient had no idea that the government had adopted the two policies, and if the recipient did not remain silent for two days, her welfare benefits would decrease next year as compared to this year, and she might feel that she had been threatened. In fact, however, she has not been threatened.⁸⁴ Her mistaken perception does not transform legitimate

82. Similarly, a government that has never before imposed a work requirement as a condition of welfare may suddenly decide to do so, but that policy change does not necessarily constitute a threat just because it imposes a more onerous condition than the historical status quo. This example is more complex than the one in the text, however, because it involves a government benefit package, not a pure threat or offer. *See infra* Part IV.

83. *See also* Lyons, *supra* note 72, at 432 (“[T]he ‘would-without-should’ condition makes a proposal coercive even when the x which P offers is not expected by Q , morally or predictively. Consider: ‘The first I knew of Uncle Harry’s plans to leave me money was when he threatened to disinherit me if I married Alice.’”).

I therefore disagree with Westen’s formulation of the coercion test in terms of what a citizen would “expect.” Westen, *supra* note 42, at 581. Even in the coercion (rather than unconstitutional conditions) context, I think that a person with mistaken expectations about what the proposer would do is not actually coerced; at worst, she feels coerced. But I do agree with Westen that a proposer coerces if the *proposer* is mistaken in believing that he will be making the recipient worse off than she otherwise would be. *Id.* at 581 (giving example of a newly conditional proposal to supply a certain amount of water, less than the amount originally agreed, where proposer and recipient both mistakenly believe that natural water supply will be low, but where actual natural supply will be higher than the amount newly proposed). The latter problem is less likely to arise when the proposer is the government, and when the situation that the recipient would “otherwise” be in depends on what the government would do, not on what would naturally occur.

If the expectation test refers to “reasonable” rather than subjective or customary expectations, then it might be the same as the hypothetical predictive test. *See, e.g.,* J. FEINBERG, HARM TO SELF 228 (1986) (apparently treating the concepts as the same). But that would only be so if the “reasonable” person should expect government to continue or alter its benefit policies without regard to threats and offers. The test is then both dubious (don’t reasonable people realize that governments sometimes make threats and offers?) and gratuitous.

84. Notice that this problem is distinct from the question whether the recipient is aware of the conditions on the government benefit when she first obtains it. This latter question is relevant to whether the recipient has subjectively “waived” the right. For example, does a person waive his right to complain about procedural conditions when he agrees to take a government job, and in that sense “take the bitter with the sweet”? *See*

government action into a threat.

I think the hypothetical judgment or prediction baseline is appropriate if we are concerned about the legitimacy of government's actions, while the expectation baseline is more appropriate if we are concerned about subjective pressure on the exercise of a right.⁸⁵ But I doubt that the problem of discrepancy frequently arises; and when it does, the government should be entitled to escape from the more stringent scrutiny attaching due to a recipient's misperception of a threat simply by correcting the misperception. Thus, I will henceforth discuss only the hypothetical judgment baseline.

PART IV

APPLICATION TO GOVERNMENT BENEFIT PROGRAMS

Unconstitutional conditions issues rarely are of the pure form that I have been discussing. Rarely does the government simply offer money, or a tax break, in exchange for a person's agreeing to forego exercise of a constitutional right (or for her agreeing to engage in conduct, such as keeping silent or giving blood, that amounts to foregoing exercise of a right). And rarely does the government simply withdraw government benefits, or increase taxes, or similarly penalize someone for exercising a right.⁸⁶ Although the threat/offers distinction is useful in the pure context, it remains to be seen whether it is useful in the more complex context of government programs.

How do we generalize from a pure threat/offers issue to the more complex issue of a condition on a government benefit package? Consider *Sherbert v. Verner*. The government offers Mrs. Sherbert a package: unemployment benefits, but with a condition that she be

Arnett v. Kennedy, 416 U.S. 134, 154 (1974) (Rehnquist, J., joined by Burger, C.J., and Stewart, J.). Only if he is aware of the "bitter" when he takes the "sweet." Of course, this is a necessary but not a sufficient condition of waiver. See text at notes 39-41.

85. Some philosophical discussions of coercion focus on the effect upon the coerced party, not the intent of the coercer nor the coercive mechanism he employs. See J. FEINBERG, HARM TO SELF 247 (1986). And Wertheimer specifically identifies a "phenomenological" nonmoral baseline, under which the victim/recipient's subjective point of view determines whether the proposal is a threat or an offer. A. WERTHEIMER, *supra* note 42, at 207.

86. However, the issue is presented in fairly pure form in *Speiser v. Randall*, 357 U.S. 513 (1958), one of the early cases finding an unconstitutional condition. A provision of the state constitution denied tax exemptions to persons who advocated the overthrow of the government. This is a straightforward denial of a benefit that the person would otherwise receive, because if the government were not permitted to impose the condition, it undoubtedly would retain tax exemptions, which serve numerous other goals. See also Kreimer, *supra* note 1, at 1355-57.

willing to accept employment every day of the week except Sunday. How do we determine what she would “otherwise” receive, apart from the condition? Is this a bribe to seek work from Monday through Saturday? Or a threat to those who are not willing to accept work from Monday through Saturday?

The hypothetical descriptive test asks whether the government would still grant unemployment benefits if it were forbidden from conditioning them on her seeking work every day of the week but Sunday. The question is not what the government would do if it could not impose any requirement that recipients seek work, for that is not Mrs. Sherbert’s objection. Presumably she would be content if she were required to seek work six days of the week, but could choose her day of rest.⁸⁷ Rather, the question is what the government would do if it were forbidden the option “seek work every day but Sunday.” If the government would still grant full unemployment benefits, then she is being penalized for not seeking work. If it would not grant the benefits, however, then the government is simply withdrawing an offer. So the threat/offer characterization depends on how important the condition is to the government’s benefit program.

Another set of analogies underscores this conclusion. Suppose the government had previously awarded unemployment benefits without any requirement that recipients seek work on Saturday or Sunday. Now distinguish two situations. In the first situation, (a), the government requires efforts to obtain Saturday work, and slightly reduces otherwise available benefits if recipients violate that condition. Alternatively, in the second situation, (b), it encourages such efforts, but this time by increasing benefits slightly if recipients satisfy the condition and seek Saturday work. Situation (a) is a threat, and situation (b) is an offer. When the government imposes an *absolute* eligibility condition for benefits, the condition seems much more like situation (a) than situation (b).

Under this analysis, many eligibility conditions on government benefits will be threats. The only conditions that will be offers are those that the government considers so important that it would rather abolish the benefit program than drop the condition.⁸⁸

87. A person who had religious reasons for worshipping and not working two days per week would also have a constitutional objection, but the hypothetical test would apply to this objection slightly differently.

88. Consider Kreimer’s discussion of *Buckley v. Valeo*, 424 U.S. 1 (1976), in which a campaign finance package provided the benefit of some government funding but also imposed a condition, limiting campaign expenditures. Are the expenditure limits threats or instead withdrawals of offers? Kreimer plausibly argues they are withdrawals of offers. If the government could not limit expenditures, it would not want to provide public financing; thus, “the denial of funds upon violation of the condition would leave the recipients with no fewer choices than they would have had in the normal course of events.” Kreimer, *supra* note 1, at 1377. See also Seidman, *supra* note 3, at 78.

I am not comfortable with this conclusion. Even if eligibility conditions on government benefits are literally threats, they function quite differently from pure threats. The condition Mrs. Sherbert must satisfy, "seek work every day but Sunday," is at least somewhat related to the type of benefit she receives. In a pure threat situation, by contrast, the nature of the government benefit is essentially irrelevant; the benefit is simply something valuable that the government can offer or withdraw in order to induce or discourage some type of conduct. Imagine, for example, that persons who failed to seek work on Saturday received a tax increase, or suffered a reduction in all otherwise available government benefits, of whatever type. These conditions would be pure threats.

To put the point another way, in the case of a pure threat the government should shoulder a heavy burden when it asks a recipient to forfeit a right on pain of losing a benefit that she would otherwise obtain, for she has not caused the relevant problem, and she receives no reciprocal benefit. The government's action is *prima facie* exploitative.⁸⁹ But when the forfeiting condition is relevant to the benefit, and when the benefit is something the government has legitimate reasons for defining and limiting in certain ways, then reciprocity might exist. The recipient is not being "drafted" to perform a public service; she is simply being asked to make reasonable sacrifices relevant to what government is providing her.

Consider limitations on campaigning by public employees, as conditions of employment. The Court has upheld such limitations.⁹⁰ Should it have treated them as pure threats, akin to a direct criminal prohibition of campaigning by government employees? I think not. For the government is not simply using the threat of terminating public employment as a convenient sword to encourage public employees not to campaign. Rather, the government believes that the rule against political activity is a sensible condition relevant to successful job performance. Indeed, even a pure offer to induce employees not to engage in political campaigning might be invalid. I doubt

89. In a similar vein, Sullivan argues: "government overreaches when it offers benefits in order to gain leverage over constitutional rights. The state may have many good reasons to deal out regulatory exemptions and subsidies, but gaining strategic power over constitutional rights is not one of them." Sullivan, *supra* note 3, at 1493. However, Sullivan's basic views differ significantly from mine: she rejects the threat/offer distinction as a guide to such government overreaching, *id.* at 1446-50, and she suggests two further principles, in addition to "overreaching" into the private realm, that should properly guide unconstitutional conditions analysis. *Id.* at 1496-99.

90. See *supra* note 9.

that the government could offer its public employees a financial bounty if they agreed not to campaign.

My tentative conclusion is that impure threats should receive a lower degree of scrutiny than pure threats. I would roughly define an "impure" threat as a condition to a government program (typically an eligibility condition) that the government plausibly believes is relevant to the legitimate purposes of that program. And lower scrutiny is appropriate because the same factors that militate in favor of higher scrutiny of pure threats militate in favor of lower scrutiny of impure ones: a government benefit program may offer reciprocal benefits, or its conditions may reflect real costs that the recipient imposes.⁹¹

Justice Scalia's opinion for the Court in *Nollan v. California Coastal Commission*⁹² presents a version of this argument. In that case, the Nollans wanted to replace their small cottage with a residence in keeping with the rest of the neighborhood. The Coastal Commission would only permit this if the Nollans also granted a public easement across the front of their beachfront property. The Supreme Court held that the permit condition was a taking. Scalia reasoned that if the Nollans were not seeking a permit to rebuild, and the government simply required them to grant an easement, the requirement would clearly be a taking.⁹³ Does attaching the easement condition to the issuance of the permit make a difference? For Justice Scalia, the answer depends on a version of the "greater includes the lesser" argument, which we could call the nexus test.

Under the nexus test, if the government could have refused the permit for a public purpose, then it can impose a lesser restriction, a permit condition — but only if that lesser restriction serves the same purpose.⁹⁴ The last proviso is very important. In Scalia's example,

91. Some philosophical writing also suggests that relevance is relevant in distinguishing threats from offers. For example, Wertheimer discusses "warning threats," by which *A* induces *B* to act differently yet does not truly threaten because *A* is simply informing *B* of a pre-existing plan. Warning threats are to be distinguished, however, from "manipulative threats," by which *A* truly threatens *B* because *A* "elicits *B*'s action by developing a plan through which he can motivate *B* . . ." A. WERTHEIMER, *supra* note 42, at 220 (relying on concepts originally developed in Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 Nw. U.L. REV. 1081 (1984)). Wertheimer then adds that "whereas the action demanded by [*A* in the first situation] is arguably germane to the point of the threat, this is not so with respect to [*A* in the second situation]." *Id.*

Wertheimer's example of a "warning threat" is a moralistic informer who tells a drug-user that he plans to inform the police. His example of a "manipulative threat" is a greedy informer who tells the user that he will inform the police unless the user pays him off. *Id.*

92. 483 U.S. 825 (1987).

93. *Id.* at 831.

94. As Scalia reasoned, the government could ban the rebuilding entirely in order to maintain visual access to the beach; therefore it could impose height limitations and could prohibit fences to that same end. *Id.* at 836.

although the government can forbid shouting fire in a crowded theater, it cannot make an exception from the requirement for those willing to donate \$100 to the state treasury. Similarly, "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"⁹⁵ Thus, the government must show that the easement condition substantially advances the legitimate government interests that would justify a complete ban on rebuilding.⁹⁶

Scalia's nexus test is similar to my proposed criterion for distinguishing pure and impure threats. For Scalia also seems interested in determining whether the government is honestly pursuing a legitimate goal, or instead is simply putting pressure on a right.⁹⁷

I am not suggesting that whenever a condition is plausibly related to the purposes of the benefit program, the condition passes constitutional muster;⁹⁸ rather, I believe that the degree of scrutiny should be less. Still, having rationality signify even in this limited way might prompt two different objections.⁹⁹

95. *Id.* at 837 (citing *J.E.D. Assoc., Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14 (1981)).

96. The Court purported to apply the test, and concluded that the easement condition did not substantially advance the asserted government interests. I have serious doubts about the Court's application of the test, but that is not my focus here.

97. I do find several problems with the *Nollan* test, however. First, the nexus test has both a "positive" and "negative" formulation, but the "negative" formulation is much more problematic. The positive formulation is that government can regulate property use with a condition if that condition serves the same purpose that a complete ban on that property use would serve. The negative formulation is that if the condition does *not* serve the same purpose, the regulation is automatically a taking. I might agree that a regulation flunking this rational nexus test should warrant greater scrutiny, but I doubt the wisdom of the blanket conclusion that all such regulations are takings.

Second, the "greater includes the lesser" positive nexus test probably cannot be generalized beyond takings law. The test seems plausible in *Nollan* only because the greater power to deny a development permit for visual access reasons often really does include the lesser power to condition that permit and require a different property restriction (an easement) if that restriction serves the same purpose. For the "lesser" here is a restriction on another property right, not a restriction on a *different* constitutional right. And citizens are more likely to consider property rights relatively "fungible." But this aspect of the nexus test is relevant only in the takings context. By contrast, consider a government's decision to require public speakers in a public park to pay for the privilege of using it. Although the government could sell the park to the highest bidder for financial reasons, it hardly follows that the government could ration access to the highest bidder for financial reasons.

98. See Rosenthal, *supra* note 11, at 1131-33 (arguing that relevance is not nearly enough to prevent a condition from being unconstitutional, citing *Sherbert* among other examples); Lyons, *supra* note 72, at 431-32 (arguing that germane conditions can nevertheless be coercive).

99. A contrary objection is that a rational condition should *never* be invalidated,

First, it seems strange to employ a test of rationality for the very purpose of determining whether a court shall ultimately employ relatively strict judicial scrutiny or instead a test of mere rationality.¹⁰⁰ For example, the condition that welfare recipients must be residents affects the right to travel, but it is a rational condition, and therefore not subject to higher scrutiny. But if the welfare program conditions benefits on a recipient agreeing never to travel outside the state, even for a short period, the relevance to the purposes of a welfare program is tenuous, and stricter scrutiny might apply. Yet this approach seems to put the cart before the horse. After all, judges usually consider the relevance of a restrictive condition to government purposes at a *later* stage of constitutional analysis, when they are trying to decide whether the condition satisfies or violates the relevant level of scrutiny.

The explanation for this unusual methodology is that rationality is legally relevant only for the limited purpose of identifying how the condition functions — as a true penalty or as a plausible condition. So the judgment of rationality itself is only a very limited one. The court should simply ask whether the condition serves the pure function of inducing the recipient to act or refrain from acting in a certain way. In other words, would the withdrawal of *any* government benefit serve that function just as well? If not, then the threat is an impure one, and judicial scrutiny should be lower.¹⁰¹

This response helps answer the second objection to the “rationality” test for the purity of the threat. Isn’t “rationality” a notoriously easy standard to satisfy?¹⁰² Especially if we concede that govern-

for such a condition amounts to the government redefining the baseline itself. The threat/offers distinction would then be entirely useless. (I thank Bob Bone for pointing out this argument.) But I reject this objection because it misunderstands the function of the threat/offers baseline. The baseline is used simply to identify what kind of step the government has taken when it makes a conditional proposal (as compared to where it otherwise would have been standing). For example, if the government newly imposes a work requirement as a condition of receipt of welfare benefits, such that a failure to work results in forfeiture of some portion of those benefits, it is misleading to say that the government has instantaneously redefined the baseline. For this characterization misses the important question — whether and to what extent the new condition worsens the beneficiary’s situation from what it would have been if the condition could not have been imposed.

100. See Sullivan, *supra* note 3, at 1457.

101. Rosenthal similarly distinguishes between “coercive conditions” that “regulate extraneous conduct” and those that are “expressions of the purpose of the expenditure itself — the agreed quid pro quo of a contract for government employment . . . or for the scholarly or other performance expected from the recipient of a grant.” Rosenthal, *supra* note 11, at 1115. Only the former, he argues, deserve close judicial scrutiny. I agree that government contracts might be distinguishable in this way, but I do not think that identifying “the purpose of the expenditure itself” is otherwise an effective criterion for deciding the proper level of scrutiny. (Rosenthal’s medical school financial aid example, *id.* at 1156, suggests problems with this criterion.)

102. See Seidman, *supra* note 3, at 76-78; Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

ment can serve ancillary goals through government benefit programs? Consider a policy of reducing general welfare benefits by fifty dollars if the recipient refuses to remain silent for two days. This, I want to say, is a pure threat. But why not say that it rationally serves one of the ancillary purposes of the welfare program, namely, encouraging the "silence" experiment?¹⁰³

The answer, in short, is that welfare benefits as such are not a peculiarly apt means of serving the goal; any other type of government benefit would serve as well. So this is a pure, not an impure, threat. Again, whether the policy is permissible is a separate question. Although the policy is not really related to the distinctive functions of a welfare program, it does serve other government purposes, and it might or might not satisfy the applicable level of scrutiny. For example, if the state has unsuccessfully tried other feasible options, this unusual scheme might actually be necessary to achieve a compelling government interest in understanding espionage.

Thus, the *Sherbert* Court was wrong to equate the loss of government benefits for failure to seek Saturday work with a direct regulation, and should have applied a lower level of judicial scrutiny. For the condition is at least plausibly related to the purposes of the program: requiring all persons to seek Saturday work avoids the cost and difficulty of distinguishing religious from nonreligious "shirkers," as well as the danger of fraudulent claims of religious motivation.¹⁰⁴

But now I am left with a final doubt.¹⁰⁵ If most complex government benefit programs involve impure rather than pure threats, and if impure threats are subject to lower scrutiny than pure threats, I am not certain that impure threats are any more troublesome than offers. In short, the threat/offer distinction might do no work at all once we conclude that the condition plausibly serves the program's distinctive purposes. Consider the hypothetical test as applied to a complex program. Often the government has made the condition an absolute condition to eligibility. Is there any remaining significance to the counterfactual question whether the government would reen-

103. See Seidman, *supra* note 3, at 77-78 (hypothesizing that federal highway funds are denied to states which permit women who have had abortions to use the highways, then asking why encouraging childbirth should not be considered an ancillary purpose of the highway program); Sullivan, *supra* note 3, at 1474.

104. See *Sherbert*, 374 U.S. at 407 (discussing danger of fraud); *id.* at 421 (Harlan, J., joined by White, J., dissenting) (discussing difficulty of distinguishing religious from nonreligious objectors).

105. I thank (!) Larry Sager for instilling this doubt.

act the program without that condition? If it would not reenact, then it considers the condition somewhat more important than if it would; yet is that enough to justify a different level of scrutiny?

The hypothetical test seems persuasive in the pure context because the government often will set a general level of welfare or tax benefits for one set of reasons, and then use those benefits as carrots and sticks for other, independent reasons. But what if the justifications are interdependent? The test might be indeterminate. This problem arises with many government benefit packages. And it is analogous to the problem, discussed earlier,¹⁰⁶ of selfish *P* who will rescue the drowning *Q* only for a fee. Sometimes *P* really has independent reasons for ordinarily rescuing or ordinarily not rescuing drowning persons, regardless of whether he considered charging a fee. But perhaps *P* has never independently considered the issue; he has always charged a fee. Similarly, a government may never have considered what it would do if it was not able to prohibit its employees from campaigning, or if it could not condition campaign finance on expenditure limitations.¹⁰⁷ Even if we could imagine the answer,¹⁰⁸ how much would it illuminate?

PART V

CONCLUSION

The distinction between threats and offers helps in fixing the proper level of judicial scrutiny for conditions upon government benefits that implicate constitutional rights. Government issues a pure threat when it puts the recipient to the choice of foregoing exercise of a right or else suffering a reduction in the level of government benefits as compared to what the government would have offered if it were not permitted to employ the objectionable condition. Government issues a pure offer when it puts the recipient to the choice of exercising a right, or else foregoing exercise and obtaining an increase in government benefits as compared to what the government otherwise would have offered. I conclude that a pure threat should ordinarily be scrutinized just as strictly as a direct and unconditional penalty upon the right. In this limited sense, the doctrine of unconstitutional conditions is valid. And a government's pure offer should ordinarily receive lesser scrutiny. However, when a condition that would otherwise appear to be a pure threat is germane to the pur-

106. See *supra* text at notes 73-77.

107. See *supra* note 88.

108. Severability clauses are only imperfect evidence of whether eligibility conditions are threats or offers. The existence of such a clause indicates that the severable condition is a threat, see Seidman, *supra* note 3, at 78, but the absence of such a clause does not indicate that the condition is an offer.

poses of a government program, I tentatively conclude that this impure threat should receive lesser scrutiny than a pure threat; indeed, it probably should receive scrutiny no greater than a pure offer. In this limited sense, the "greater power includes the lesser."

The threat/offer distinction, though often clear, is occasionally problematic. Specifically, the practical application of the hypothetical standard, "what the government would otherwise have provided if it were not permitted to attach the objectionable condition," can be awkward, and in some cases impossible. Moreover, even when the distinction is coherent and practicable, it is not necessarily determinative of constitutionality. Sometimes both the threat and the corresponding offer are constitutional; sometimes neither are; sometimes, indeed, the threat is constitutional but the corresponding offer is not.¹⁰⁹ The threat/offer distinction might only be one element in a complete unconstitutional conditions analysis.

Nevertheless, in a number of cases, the threat/offer distinction matters: threats are properly subject to higher scrutiny than offers, usually the same level of scrutiny that would attach to direct, unconditional regulation. I hope this essay offers plausible arguments to that effect, and does not threaten to increase confusion. But I welcome strict scrutiny of the arguments in either case.

109. See *supra* note 62 & text at note 68.

